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6 **UNITED STATES DISTRICT COURT**
7 **SOUTHERN DISTRICT OF CALIFORNIA**
8

9 CATLIN UNDERWRITING AGENCIES
10 LIMITED,

Plaintiff,

11 vs.

12 SAN DIEGO REFRIGERATED
13 SERVICES, doing business as San Diego
14 Terminals; PLA-ART
15 INTERNATIONAL, doing business as
16 San Diego Cold Storage; SAN DIEGO
17 COLD STORAGE, INC.; MIGUEL
18 CUEVA, also known as Miguel Tamayo;
19 SERGIO HERNANDEZ; MARCUS
20 FOODS, INC.; DOES 1 to 100, Inclusive,

Defendants.

18 SAN DIEGO REFRIGERATED
19 SERVICES, INC.,

Counter Claimant

20 vs.

21 CATLIN UNDERWRITING AGENCIES
22 LIMITED,

Counter Defendant.

23 MIGUEL CUEVA,

Counter Claimant

24 vs.

25 CATLIN UNDERWRITING AGENCIES
26 LIMITED,

Counter Defendant.

27 HAYES, Judge:

28 The matter before the Court is the Motion to Alter or Amend Judgment (Doc. # 85) filed

CASE NO. 08cv173 WQH (JMA)

ORDER

1 by Pla-Art International.

2 BACKGROUND

3 This action arises out of an insurance coverage dispute regarding coverage under an
 4 insurance policy issued by Plaintiff to Defendants San Diego Refrigerated Services, Inc. and
 5 Pla-Art International (collectively the “Insured Defendants”), which are engaged in the
 6 business of operating cold storage warehouse facilities. On January 29, 2008, Plaintiff
 7 initiated this action by filing its complaint. (Doc. # 1). The complaint sought a judicial
 8 determination that Plaintiff did not have a duty to indemnify or to defend the Insured
 9 Defendants in a lawsuit relating to the Insured Defendants’ release and sale of goods belonging
 10 to a third party. *Id.* On April 13, 2008, the Insured Defendants filed an answer and
 11 counterclaim which sought a declaration that Plaintiff did have a duty to indemnify and defend
 12 the Insured Defendants and alleged a claim for breach of the covenant of good faith and fair
 13 dealing. (Doc. # 13). Plaintiff filed an answer denying the allegations of the counterclaim.
 14 (Doc. # 15). The parties filed cross-motions for summary judgment in early 2009. On March
 15 16, 2009, the Court heard oral argument on the cross-motions for summary judgment. On May
 16 12, 2009, the Court ruled on the parties’ cross-motions. (Doc. # 54). The Court granted
 17 Plaintiff’s motion for summary judgment as to the duty to defend and dismissed Plaintiff’s
 18 claim for a judicial determination that there was no duty to indemnify as moot.¹ *Id.* at 10-11.
 19 The Court denied the Insured Defendants’ motion for summary judgment. *Id.* at 10. On May
 20 14, 2009, a judgment was entered. (Doc. # 55). On June 8, 2009, the Insured Defendants filed
 21 a notice of appeal. (Doc. # 58).

22 On September 14, 2009, the United States Court of Appeals for the Ninth Circuit
 23 entered an order dismissing the appeal. (Doc. # 70). The order states: “Appellee’s motion to
 24 dismiss this appeal for lack of jurisdiction is granted because the district court’s order
 25 challenged in this appeal did not dispose of the action as to all claims and all parties. *See* Fed.
 26 R. Civ. P. 54(b); *Chancon v. Babcock*, 640 F.3d 221 (9th Cir. 1981).” *Id.* at 1. The mandate

27
 28 ¹ The duty to indemnify claim was moot because in the underlying litigation, the California Court of Appeal affirmed summary judgment in favor of the Insured Defendants. *Id.* at 10-11.

1 of the Court of Appeals was issued on October 6, 2009. (Doc. # 71).

2 On October 7, 2009, this Court issued an order spreading the mandate and ordering each
3 party to “file a status report within fifteen days of the date of this order identifying the claims
4 and parties remaining in the case.” (Doc. # 72). The order also vacated the judgment. *Id.*

5 On October 22, 2009, Plaintiff filed a status report which states that the only remaining
6 claim is the Insured Defendants’ second counterclaim for breach of the covenant of good faith
7 and fair dealing. (Doc. # 74). On October 22, 2009, the Insured Defendants filed a status
8 report which also states that the only remaining claim is the Insured Defendants’ second
9 counterclaim for breach of the covenant of good faith and fair dealing. (Doc. # 75). On
10 January 6, 2010, the Magistrate Judge ordered the parties to appear at a status conference on
11 January 27, 2010. (Doc. # 76). On February 9, 2010, Plaintiff filed an Amended Motion to
12 Dismiss Defendants’ Second Counterclaim. (Doc. # 81). The Insured Defendants conceded
13 that this Court’s May 11, 2009 order that Plaintiff had no duty to defend logically required the
14 dismissal of the Insured Defendants’ second counterclaim for breach of the covenant of good
15 faith and fair dealing. (Doc. # 82 at 3). The insured defendants stipulated to the dismissal of
16 the second counterclaim, but sought dismissal without prejudice. *Id.* On April 2, 2010, the
17 Court granted Plaintiff’s Amended Motion to Dismiss and dismissed the second counterclaim
18 for breach of the covenant of good faith and fair dealing with prejudice. (Doc. # 83 at 3-4).
19 The Court also amended its May 11, 2009 order granting summary judgment in favor of
20 Plaintiff:

21 The Conclusion of the Court’s May 11, 2009 Order (Doc. # 54) at page 11 line
22 24 through page 12 line 3 is vacated and replaced as follows:

23 IT IS HEREBY ORDERED THAT the Motion for Partial Summary Judgment
24 as to Liability on its First Counterclaim Against Caitlin Underwriting Agencies
25 (Doc. # 42) filed by Defendant Pla-Art International is **DENIED**. The Amended
26 Motion for Summary Judgment filed by Plaintiff (Doc. # 47) is **GRANTED** as
27 to Counts 1, 2, and 4 on the grounds that Plaintiff had no duty to defend.
28 Defendants’ first counterclaim for breach of the duty to defend is therefore
DISMISSED WITH PREJUDICE. Plaintiff’s Count 3 for failure to notify is
DISMISSED AS MOOT. Plaintiff’s claims relating to the Duty to Indemnify
are **DISMISSED AS MOOT** because Defendants were not found liable in the
underlying action.

Id. at 4. The Clerk of the Court was ordered to enter judgment in favor of Plaintiff and against

1 Defendants. *Id.* On April 5, 2010, the Clerk fo the Court entered the judgment. (Doc. # 84).

2 On April 16, 2010, Pla-Art filed its Motion to Amend or Alter Judgment entered April
3 5, 2010 pursuant to Federal Rule of Civil Procedure 59. (Doc. # 85).

4 ANALYSIS

5 Pla-Art contends that the underlying complaint's first cause of action for breach of
6 contract was "a fallback" which was pleaded in addition to conversion in case the plaintiffs in
7 that action "were unsuccessful in establishing the intent required for the conversion claim."
8 (Doc. # 85 at 2-3). Pla-Art contends that Plaintiff "has not met its burden to present
9 undisputed facts that eliminate any possibility of coverage as a matter of law." *Id.* at 4. Pla-
10 Art contends that if the plaintiff in the underlying case had "succeeded in proving that its
11 contract was breached inadvertently or negligently it could prevail in its claim for contract
12 damages." *Id.* Pla-Art contends that it established that "there is a potential for coverage
13 because plaintiff in the Underlying Case has alleged a breach of contract which may or may
14 not be intentional." *Id.* Pla-Art further contends that summary judgment should not have been
15 granted on Count IV of Plaintiff's complaint because the Court dismissed the duty to
16 indemnify count as moot and "the applicability of an exclusion is only relevant" to the issue
17 of duty to indemnify. (Doc. # 85-2 at 5).

18 Plaintiff contends that Pla-Art must establish that the Court committed clear error in
19 order to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). (Doc.
20 # 86 at 3). Plaintiff contends that "there is nothing new in [Pla-Art's] argument—Defendant has
21 merely attempted a different and more confusing formulation of the same" arguments
22 previously raised. *Id.* at 5. Plaintiff contends that the underlying complaint alleged intentional
23 breach of contract because it is accompanied by a claim for conversion. *Id.* at 5-6. Plaintiff
24 contends that the underlying complaint was based on the "theft of inventory" by employees
25 of the Insured Defendants, an intentional act which does not trigger the duty to defend. *Id.* at
26 7.

27 "It is appropriate for a court to alter or amend judgment under Rule 59(e) if (1) the
28 district court is presented with newly discovered evidence, (2) the district court committed

